IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner,

v.

HAROLD W. DORAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF FOR THE RESPONDENT

STATE APPELLATE DEFENDER
OFFICE

KATHLEEN M. CUMMINS
Assistant Defender
Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
256-2814

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

CASES:

UNITED STATES STATUTES AND CONSTITUTIONAL PROVISIONS:

STATE STATUTES AND RULES:

SECONDARY AUTHORITIES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner,

v.

HAROLD W. DORAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF FOR THE RESPONDENT

COUNTERSTATEMENT OF THE QUESTION PRESENTED

THE MICHIGAN SUPREME COURT DID NOT MISCONSTRUE THE FOURTH AMENDMENT AND THE EXTRADITION CLAUSE BY HOLDING THAT THE SCOPE OF A HABEAS CORPUS CHALLENGE TO EXTRADITION LEGITIMATELY ENCOMPASSES A SCRUTINY BY THE ASYLUM JURISDICTION OF THE CHARGING DOCUMENTS SUPPORTING THE DEMANDING STATE'S

REQUISITION TO DETERMINE WHETHER SUCH DOCUMENTS FACIALLY REFLECT PROBABLE CAUSE AND HENCE SUBSTANTIALLY CHARGE THE ACCUSED FUGITIVE WITH CRIME.

COUNTERSTATEMENT OF THE CASE

On December 18, 1975, Harold William Doran, returning from Arizona, was arrested in Bay City, Bay County, Michigan and charged with receiving and concealing stolen property. MCLA 750.535; MSA 28.803. The charge was based on Mr. Doran's possession of the truck in which he had driven to Michigan from Arizona. Immediately after his arrest, the Bay City police notified authorities in Maricopa County (Phoenix) Arizona. Soon thereafter, a photograph of Mr. Doran, dated December 18, 1975, was forwarded to the Phoenix Police Department (A 29). On January 7, 1976, a Phoenix justice of the peace issued a warrant seeking Mr. Doran for theft of a motor vehicle or alternatively, theft by embezzlement. ARS 13-672(A), 13-1645, 13-661-13-663, 13-671(A); ARS 13-682, 13-688 (A 26). The warrant was issued on the strength of a complaint by a Phoenix police officer. The "date of offense" alleged in the warrant and complaint was December 18, 1975, the date of Mr. Doran's arrest in Bay County. On or about April 26, 1976, the Phoenix authorities amended the date of offense by photocopying the original complaint and warrant, scoring out "December 18, 1975" and writing in "December 3", 1975. The amended complaint and warrant were sent to the Bay County Prosecutor, but not to the governors of Arizona or

Michigan. The Arizona executive had already on February 11, 1976 forwarded a requisition to Michigan for the rendition of Mr. Doran. Attached to the requisition were the original complaint and warrant (A 24-26) and two supporting affidavits by a police officer, both of which postdated the complaint and warrant by almost a month (A 27-28).

By this time, Bay County was holding Mr. Doran solely as a fugitive, (A 30-31) since the Michigan receiving and concealing charge had been "nolle prossed" in deference to the extradition proceedings. The Michigan Governor's warrant issued March 22, 1976.

Mr. Doran twice petitioned the arraigning court for a writ of *habeas corpus.* Both writs were successively denied by that Court after hearings held April 8 and 9, 1976, and August 10 and 13, 1976. After failing to obtain relief on either petition in the Michigan Court of Appeals, Appellee applied to the Michigan Supreme Court which granted leave to appeal November 1, 1976.

On October 4, 1977, the Michigan Supreme Court reversed the Bay County Circuit Court and ordered Mr. Doran's immediate release. *In the Matter of Doran (People v. Doran),* 401 Mich. 235; 258 N.W. 2d 406 (1977). By this date, Mr. Doran had been incarcerated in the Bay County jail almost two years, the trial and appellate courts having refused his repeated requests to set bond.

After unsuccessfully applying for rehearing, the Michigan Attorney General petitioned this Court for certiorari which was granted April 17, 1978. Petitioner's Brief was received by Counsel for Respondent on June 30, 1978. Respondent now files his Brief on Appeal.

ARGUMENT

I.

THE STATE OF MICHIGAN HAS THE RIGHT AND DUTY TO REFUSE TO EXTRADITE AN ACCUSED FUGITIVE ON THE BASIS OF A MERE CHARGE IF THE CHARGING DOCUMENTS TENDERED BY THE DEMANDING STATE DO NOT FACIALLY REFLECT AND SUPPORT A JUDICIAL FINDING OF PROBABLE CAUSE WITHIN THE MEANING OF THE FOURTH AMENDMENT.

In *In the Matter of Doran (People v. Doran)*, 401 Mich. 235; 258 N.W. 2d 406 (1977), the Michigan Supreme Court determined that:

> "Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause.
>
> "Where there has been no indictment or judicial determination of probable cause in the demanding state, a requirement that the demanding state's affidavit set forth facts which support a determination of probable cause safeguards citizens and other persons found in the asylum state against abuse of the extradition process." *In the Matter of Doran*, 401 Mich. at 250.

The Attorney General argues that this holding misconstrues the Fourth Amendment and conflicts with the purpose of the Extradition Clause. Neither of these arguments have merit.

A. A State has a right and duty to protect its inhabitants from unreasonable intrusions upon their persons or property.

The Fourth Amendment protects against unfounded invasions of liberty and privacy. *Gerstein v. Pugh*, 420 U.S. 103, 112; 95 S. Ct. 854; 43 L.Ed.2d 54 (1975). *Wolf v. People of State of Colorado*, 338 U.S. 25; 69 S. Ct. 1359; 93 L.Ed. 1782 (1949) made the Fourth Amendment applicable to the states through the Fourteenth Amendment, and *Mapp v. Ohio*, 367 U.S. 643; 81 S. Ct. 1684; 6 L.Ed.2d 1081 (1961) made it enforceable against them by the same sanctions and by application of the same constitutional standards as prohibit unreasonable Federal intrusions into the security and privacy of individuals.

In *Ker v. California*, 374 U.S. 23, 32; 83 S. Ct. 1623; 10 L.Ed.2d 726 (1963), this Court emphasized that implicit in the Fourth Amendment protection from unreasonable searches and seizures is its recognition of individual freedom. "That safeguard has been declared to be 'as of the very essence of constitutional liberty,' the guaranty of which 'is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen.' " In *Ker, supra* and *Mapp, supra*, this Court made clear that governmental invasions of personal liberty must be reasonable.

The statutory extradition process is a right conferred upon the asylum state whereby, as a sovereign, it may assert its prerogative to protect its own citizens or persons within its boundaries from unjust criminal actions that may be brought by a sister state. See *State ex rel Niederer v. Cady*, 72 Wis. 2d 311; 240 N.W. 2d 626 (1976). Thus, the state of Michigan had the right to measure the proposed

extradition of Mr. Doran against Fourth Amendment standards of reasonableness.

B. Wherever possible, a serious invasion of liberty must be preceded by an independent determination of probable cause made by a neutral and detached magistrate.

To implement the Fourth Amendment's protection against unfounded and unreasonable invasions of liberty and privacy, this Court "has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein v. Pugh,* supra, 420 U.S. at 112. Whether the intrusion is an arrest or a search and seizure of premises and property, this Court has required that it be justified by a showing of probable cause which exists where

> "the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

Brinegar v. United States, 338 U.S. 160, 175; 69 S. Ct. 1302; 93 L.Ed. 1879 (1949). Unless the exigencies of legitimate law enforcement dictate otherwise, *Gerstein v. Pugh, supra,* 420 U.S. 113, the Fourth Amendment requirement of reasonableness entails that arrests or searches be preceded by the issuance of a warrant by a neutral and detached magistrate who has found probable cause based on a complaint or affidavit containing independent factual support for this finding. *Giordenello v. United States,* 357 U.S. 480; 78 S. Ct. 1245; 2 L.Ed.2d

1503 (1958); *Aguilar v. Texas,* 378 U.S. 108; 84 S. Ct. 1509; 12 L.Ed.2d 723 (1964). The complaint or affidavit underlying the warrant must state sufficient facts to provide an independent basis for the magistrate's conclusion that probable cause exists. *Aguilar, supra.* This "independent basis" safeguard prevents the magistrate from serving "merely as a rubber stamp for the police" *Aguilar,* 378 U.S. at 111, and averts the consequences of overzealous law enforcement:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Johnson v. United States, 333 U.S. 10, 13-14; 68 S. Ct. 367; 92 L.Ed. 436 (1948).

In addition to forming an independent basis for the magistrate's neutral and detached judgment, the complaint normally embodies the only record of information brought to the magistrate's attention at the time the warrant is issued, and thus is the *only* means by which the reviewing court can assess the validity of the probable cause finding. *Giordenello v. United States,* 357 U.S. 480, 486; 78 S. Ct. 1245; 2 L.Ed.2d 1503 (1958). To fulfill both functions an adequate factual demonstration of probable cause must appear on the *face* of the supporting affidavit or complaint. *Giordenello, supra,* 357 U.S. 480, 487. A constitutionally acceptable demonstration of probable cause has been held to require a statement of personal knowledge, or if based on information and belief, an identification of the sources of

that belief and a recitation of sufficient underlying circumstances to support an independent judgment that the belief is probably true. If the sources are not identified, the affiant must disclose "some of the underlying circumstances" from which he concluded that the source was credible or his information reliable. See *Aguilar v. Texas, supra,* 378 U.S. 108, 114; *Giordenello v. United States, supra; Spinelli v. United States,* 393 U.S. 410; 89 S. Ct. 584; 21 L.Ed.2d 637 (1969); *United States v. Ventresca,* 380 U.S. 102, 109; 85 S. Ct. 741; 13 L.Ed.2d 684 (1965); *United States ex rel Grano v. Anderson,* 446 F.2d 272, 275 (CA3, 1971) (Dissenting opinion of Circuit Judge Van Dusen).

C. Extradition is a serious invasion of liberty which must be preceded by a determination of probable cause. This determination must appear on the face of the charging documents supporting the rendition request.

As noted by Appellant, the Michigan Supreme Court's conclusion that a complaint or affidavit in support of a rendition request must reflect probable cause rested squarely on the holding of *Kirkland v. Preston*, 128 U.S. App. D.C. 148; 385 F.2d 670 (1967). Since *Kirkland* is the fountainhead of the trend toward requiring probable cause for extradition arrests, a detailed exposition of its reasoning is necessary.

In *Kirkland,* the petitioners were being held for rendition to Florida. The Florida requisition was supported by charging documents similar to the Arizona documents in the instant case: the affidavit of a Miami police officer, sworn to before a justice of the peace, and an arrest warrant

issued by the same justice of the peace. The police officer's complaint, apart from filling in the date, location and ownership of the premises burnt, used only the statutory charging language for arson:

> "* * * [O]n the 23rd day of July A.D., 1965, in the County and District aforesaid [Dade County] one Oliver Lee Kirkland & Elizabeth Maria Smith DID THEN AND THERE: unlawfully, wilfully, maliciously and feloniously set fire to and burn or cause to be burned a certain building, to wit: The Hut Bar, located at 2280 S.W. 32nd Avenue, City of Miami, Dade County, Florida, a further and more particular description of said bar being to the affiant unknown, the said bar being the property of one Fredrich Ritter."

Kirkland, supra 385 F.2d at 672. Interpreting 62 Stat. 822 (1948); 18 U.S.C. §3182, which permits extradition based upon "an indictment found or an affidavit made before a magistrate. . . , charging the person demanded with having committed treason, felony, or other crime", the Circuit Court, per Judge J. Skelly Wright, held that:

> ". . . for purposes of extradition, the Section 3182 'affidavit' does not succeed in 'charging' a crime unless it sets out facts which justify a Fourth Amendment finding of probable cause." *Kirkland, supra* 385 F.2d at 674.

Crucial to the *Kirkland* holding was the recognition that extradition makes deep inroads upon personal liberty:

> "The law appreciates the hardship which extradition can involve: not only the suspension of one's liberty, but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition." *Kirkland, supra,* 676.

This reasoning compelled the conclusion that:

> "There is no reason why the Fourth Amendment, which governs arrests, should not govern extradition arrests. Under its familiar doctrine arrests must be preceded by a finding of probable cause. When an extradition demand is accompanied by an indictment, that document embodies a grand jury's judgment that constitutional probable cause exists. But when the extradition papers rely on a mere affidavit, even where supported by a warrant of arrest, there is no assurance of probable cause unless it is spelled out in the affidavit itself. Thus Fourth Amendment considerations require that before a person can be extradited on a Section 3182 affidavit the authorities in the asylum state must be satisfied that the affidavit shows probable cause." *Kirkland, supra,* 676.

The Michigan Supreme Court is a relative latecomer among the many jurisdictions, state and federal, which have espoused the *Kirkland* rule and rationale. Several courts, notably those of Colorado, New York and Nevada have held that where extradition is sought upon a charge, the requisition must be supported by documents not only indicating a judicial finding of probable cause but reciting on their face sufficient underlying facts to satisfy the governor, or habeas corpus court, that probable cause exists. *Montague v. Smedley*, 557 P.2d 774 (Alaska S. Ct. 1976); *Pippin v. Leach*, 534 P.2d 1193 (Colo., 1975); *Wood v. Leach*, 540 P.2d 1084 (Colo., 1975); *Martinez v. Sheriff of Clark County*, 90 Nev. 371; 527 P.2d 1200 (1974); *Sheriff of Clark County v. Thompson*, 85 Nev. 211; 452 P.2d 911 (1969); *People v. McFall*, 175 Colo. 151; 486 P.2d 6 (1971), clarifying *Hithe v. Nelson*, 172 Colo. 179; 471 P.2d 596 (1970); *Brode v. Power*, 31 Conn. Sup. 412; 332 A.2d 376 (1974); *Tucker v. Commonwealth*

of Virginia, 308 A.2d 783 (D.C. App., 1973); *People ex rel Cooper v. Lombard*, 45 Ap. Div. 2d 928; 357 N.Y.S.2d 323 (1974) (Fourth Department); *People ex rel Gatto v. District Attorney of Richmond County*, 32 Ap. Div.2d 1053; 303 N.Y.S.2d 726 (1969) (Second Department); *People ex rel Porzio v. Wright*, 59 Misc.2d 1056; 301 N.Y.S.2d 668 (1969); *People v. Artis*, 32 Ap. Div.2d 554; 300 N.Y.S.2d 208 (1969) (Second Department); *Application of Evans*, 512 S.W.2d 238 (Mo. App., 1974); *Coca v. Sheriff of Denver*, 184 Colo. 11; 517 P.2d 843 (1974); *Lopez v. Cronin*, 568 P.2d 43, 44 (Colo., 1977); *Jordan v. Cronin*, 554 P.2d 1099 (Colo., 1976); *United States ex rel Mayberry v. Yeager*, 321 F. Supp. 199 (D. New Jersey, 1971); *Wellington v. State of South Dakota*, 413 F. Supp. 151 (S.D. South Dakota, 1976) *reversing Wellington v. State*, 238 N.W.2d 499 (S.D., 1976); *United States ex rel Grano v. Anderson*, 446 F.2d 272 (CA3, 1971).

As do *Kirkland* and *In the Matter of Doran*, these cases scrutinize requisition supporting documents for probable cause only when there is no built in guaranty that a prior probable cause determination has taken place: for example, where extradition is sought upon the basis of a conviction: *Wortham v. State*, 519 P.2d 797 (Alaska S. Ct. 1974); *Wynsma v. Leach*, 536 P.2d 817 (Colo., 1975), an information binding the accused over for trial after a preliminary probable cause hearing, *Christoper v. Cronin*, 564 P.2d 424 (Colo., 1977); *In Re Norma Moore*, 313 N.E. 2d 893 (Mass. App., 1974) or an indictment, which embodies a grand jury's finding of probable cause. *People v. Jackson*, 180 Colo. 135; 502 P.2d 1106 (1972).[1]

[1]There are numerous other variations in the application of Kirkland. For example, some courts have held that the pre-rendition probable

(continued)

Although conceding the great appeal of the proposition that affidavits which charge a crime for extradition purposes should recite sufficient facts to show probable cause, the Illinois Supreme Court declined reluctantly to follow Kirkland. *People ex rel Kubala v. Woods,* 52 Ill.2d 48; 284 N.E. 2d 286 (1972); See also *People v. Jimmie Wade Lauderdale,* 16 Ill. App.3d 916; 306 N.E. 2d 913 (1974).

The Court of Appeals for the First Circuit has also recognized the serious threat to individual liberty posed by extradition. In *Ierardi v. Gunter,* 528 F.2d 929 (CA 1, 1976), the Court upheld the district court in reversing the Supreme Judicial Court of Massachusetts. [*In Re Ierardi,* 321 N.E. 2d 921 (Mass., 1975)] and stated that:

> ". . . we think interstate extradition necessarily involves significant restraint. At best extradition means an extended period of detention, involving custody pending administrative arrangements in two states as well as forced travel in between. At worst it means separation from a familiar jurisdiction and effective denial of the support of family, friends and familiar advisors." *Ierardi v. Gunter, supra,* 930.

In refusing to extradite Ierardi on the basis of a prosecutor-executed information, the First Circuit relied upon *Gerstein v. Pugh,* 420 U.S. 103; 95 S. Ct. 854; 43 L.Ed.2d 54 (1975) in which this Court held that "the Fourth Amendment requires a timely *judicial* determination of probable cause as a prerequisite to "any significant pretrial restraint of liberty." *Gerstein,* 420 U.S. at 125.

(footnote continued from preceding page)
cause requirement is satisfied by a showing of probable cause to believe that the accused is a fugitive from justice. See *Glavin v. Warden,* 163 Conn. 394; 311 A.2d 86 (1972); and most recently *Marshall v. Gedney,* 23 CLR 2117; ___ Pa. ___ ; ___ A.2d ___ (3-23-1978).

From *Kirkland* and *Ierardi* a two-pronged rule can be extrapolated: Before the significant restraint of extradition takes place, charging documents submitted by the demanding state should reflect, *on their face,* sufficient facts to satisfy the asylum executive that probable cause exists for charging the accused fugitive with crime in the demanding state. Moreover, the requisition supporting papers should show that probable cause was determined by a neutral and detached magistrate.

The purpose of requiring facts showing probable cause to be spelled out in the four corners of the affidavit is to permit an independent assessment of probable cause in the asylum state. As was eloquently stated in *Kirkland* at 677:

> "In addition, the interests of the asylum state are advanced by its own probable cause determination. For it would be highhanded to compel that jurisdiction to lend its coercive authority, and the processes of its law, against even its own citizens in aid of an enterprise the key details of which remain in the dark. If, as here, it turns out that the prosecution against the fugitive is unfounded, the asylum state will have expended its resources and given the legitimizing stamp of its judiciary to a cause which is at best futile, at worst arbitrary."

Appellant argues that a determination of probable cause prior to extradition is not necessary since extradition is merely a preliminary step in securing the arrest and detention of the fugitive and that, in any event, he may litigate the question of probable cause upon his return to the demanding state. Such an argument intimates that extradition is a relatively minor intrusion upon personal liberty which, like a stop, does not require the full panoply of Fourth Amendment protection. This claim softpedals the

harsh reality of extradition. The intrusion posed by extradition is equally as disruptive as that posed by a conventional arrest. If anything, extradition particularly when sought on an untried charge, represents a far more grievous encroachment upon personal liberty than an ordinary arrest: not merely incarceration in both states pending extradition and trial, but forced travel to another jurisdiction sometimes, as in this case, over 1,500 miles away from the domicile of the accused. This is a "significant restraint" unto itself, distinct from mere pretrial detention. Where such deprivation is at stake, the reasons for dispensing with the magistrate's neutral judgment evaporate. *Gerstein v. Pugh, supra,* 420 U.S. 114. The fact, as Appellant points out, that *Gerstein v. Pugh* is not an extradition case does not detract from its importance in defining Fourth Amendment prerequisites to extended custody. Because of the unique nature of an extradition arrest, a probable cause determination upon returning to the demanding state comes too late. See: *People v. Sterbins,* 32 Mich. App. 508, 511; 189 N.W. 2d 154 (1971).

D. The issue of probable cause for extradition custody must be litigated, if at all, in the asylum state.

The argument for requiring a probable cause showing prior to extradition cannot be defeated by the bromide that the accused fugitive may resort to his Fourth Amendment remedy upon his return to the demanding state. There *is* no remedy for wrongful extradition once extradition has taken place.

This Court has repeatedly held that the method of a person's rendition, whether by illegal extradition or outright forcible abduction, does not affect the validity of subsequent proceedings in the demanding state and cannot be raised as a collateral issue in the demanding state. As noted in *Pettibone v. Nichols,* 203 U.S. 192, 214; 27 S. Ct. 111; 51 L.Ed. 148 (1906);

> ". . . the act complained of does not relate to the restraint from which the petitioner seeks to be relieved, but to the means by which he was brought within the jurisdiction of the court under whose process he is held."

See also *Ker v. Illinois,* 119 U.S. 436; 7 S. Ct. 225; 30 L.Ed. 421 (1886); *Mahon v. Justice,* 127 U.S. 700; 8 S. Ct. 1204; 32 L.Ed. 283 (1888); *State ex rel Niederer v. Cady,* 72 Wis. 2d 311; 240 N.W. 2d 626, 630 (1976).

In an extradition case, the restraint for which prior probable cause justification is sought is not merely arrest pursuant to the demanding state's warrant but the distinct and equally onerous deprivation of *forced removal* from one state to another. Once the forced travel has taken place, the accused may litigate the validity of the demanding state's hold on him in a probable cause hearing. However, he has no remedy for the forcible removal since it has already taken place. The question is moot.[2]

Thus, extradition presents the anomaly of custodial restraint, serious enough to warrant Fourth Amendment protection but without guaranty of post facto redress if extradition takes place without probable cause. Unlike warrantless arrests and searches, which can be vindicated by

[2]It is for this reason that courts in order to preserve the viability of the issues in extradition appeals, have been forced to stay extradition. See *People ex rel Meeker v. Baker,* 139 Ap. Div. 471 (1910). Extradition was stayed in this case (A 13).

an after-the-fact probable cause hearing or redressed by the imposition of the exclusionary rule, an extradition without probable cause has no remedy except prevention. Courts have so far been unwilling to formulate an exclusionary rule for wrongful extradition. *Boag v. State,* 21 Ariz. App. 404; 520 P.2d 317 (1974). Thus, extradition is one area where, contrary to the Michigan attorney general's blithe assumption, the courts of the demanding state are not empowered to protect the rights of the accused.

If probable cause as a prerequisite to the significant restraint of extradition is, as Appellee insists, a constitutional right, it must have parity with other constitutional rights: that is to say, it must be enforceable. See *Mapp v. Ohio,* 367 U.S. 643; 81 S. Ct. 1684; 6 L.Ed.2d 1081 (1961). The only way to enforce this right is to require that this severe intrusion take place only after a demonstration of probable cause. The logical forum for a determination that the charging papers submitted by the demanding state reflect and factually support a prior judicial finding of probable cause is the asylum state, prior to extradition. See *Kirkland, supra* 385 F.2d at 676; *Ierardi v. Gunter, supra* 931.

E. The asylum state has no obligation to extradite upon the basis of a conclusory statement that a judge has found probable cause if the documents accompanying the requisition do not contain sufficient data to support an independent finding of probable cause.

The Michigan Attorney General, apparently as an alternative to his query whether the asylum state has a right to require any probable cause showing prior to rendition,

argues that the Arizona arrest warrant's bald statement that the magistrate had "found reasonable cause to believe that such offense(s) were committed and the accused committed them", (A 64) supplies the requisite finding. The Attorney General also cites *Ierardi v. Gunter, supra,* for the proposition that the asylum state should be permitted to rely on the "presumption of regularity of the demanding state's probable cause determination." (Brief for the Petitioner, pp. 22-23).

To permit such reliance, particularly in the case at bar, would totally subvert the salutory effects of the *Kirkland* doctrine.

Appellee concedes that a few cases have read *Ierardi* to permit acceptance by the asylum state of a demanding state's judicial warrant finding probable cause, even if the warrant or other papers do not state facts establishing probable cause. *In Re Consalvi,* 370 N.E. 2d 707, 708-709 (Mass. App., 1977); *Smith v. Helgemoe,* 367 A.2d 218 (N.H., 1977); *In Re Puopolo,* 362 N.E. 2d 1198 (Mass., 1977). This interpretation is based on the following passage from *Ierardi*:

> "If, for example, the papers submitted by Florida were to show that a judicial officer or tribunal there had found probable cause, Massachusetts would not need to find probable cause anew, nor would it need to review the adequacy of the Florida determination. Instead, it would be entitled to rely on the official representations of its sister state that the requisite determination had been made; thus in our view Massachusetts may credit an arrest warrant shown to have issued upon a finding of probable cause in Florida just as it would credit a Florida indictment." *Ierardi v. Gunter,* supra 931.

Ierardi's language does not support the claim that a barren assertion that probable cause has been found, without supporting facts, will suffice to justify extradition.

The key is what is meant by "an arrest warrant *shown* to have issued upon a finding of probable cause. . ." *Ierardi*, 931, (Emphasis supplied). *Ierardi* must be read consistently with the constitutional authorities which it cites, particularly *Gerstein v. Pugh, supra* and the requirement of "the neutral and detached judgment of a judicial officer or tribunal" (*Ierardi*, 931). Thus, an arrest warrant "shown" to have issued on probable cause can only mean a warrant accompanied by sufficient independent facts to assure that the magistrate's judgment was indeed "neutral and detached" and not merely a rubber stamp for police suspicion. *Aguilar v. Texas, supra; United States v. Ventresca, supra*, 380 U.S. 102 at 109.

The asylum jurisdiction has a duty "to make certain that the requirements of the Uniform Criminal Extradition Act have been satisfied before the accused is surrendered to the demanding state" *Commonwealth v. Carlos*, 341 A.2d 71, 73 (PA. S. Ct., 1975). To discharge this obligation, an asylum state has a right to require that the demanding state's warrant[3] be accompanied by a complaint or affidavit reflecting on its face sufficient facts to satisfy the asylum governor, or habeas corpus court, that there is an independent basis for the magistate's finding of probable cause. *Application of Evans*, 512 S.W. 2d 238, 240, 242 (Mo. App., 1974); 35 CJS Extradition §14(7) p. 422; *Pippin v. Leach, supra*, 534 P.2d 1196; *Kirkland v. Preston, supra*, 385 F.2d 670, 677.

[3]At least one court has concluded that a complaint or affidavit from the demanding state stating facts upon which an independent determination of probable cause can be based is the key prerequisite to rendition and that a warrant is mere surplusage. See *State ex rel Sieloff v. Golz*, 80 Wis. 2d 225; 258 N.W. 2d 700 (1977); *Grant v. Shobe*, 18 Or. App. 188; 524 P.2d 550 (1974).

In the case at bar, the arrest warrant tendered by Arizona states, in form language

> "I have found reasonable cause to believe that such offense(s) were committed. . ."

under which, in the appropriate blank, a justice of the peace has affixed her signature.

The Attorney General does not take issue with the Michigan Supreme Court's finding that the Arizona documents did not reflect probable cause, but instead concedes that this is a question upon which reasonable minds may differ. (See Petition for Writ of Certiorari, p. 6). Consequently, Appellee will not belabor the point here by detailing the content, or lack thereof, of the charging documents accompanying the Arizona requisition. Suffice it to say that the warrant and the complaint are framed in the conclusory charging language of the applicable Arizona Penal Code sections (ARS 13.672(A); 13.1645; 13.661-663; 13.671(A); ARS 13.682; 13.688) for embezzlement and/or larceny of an automobile, with the date, vehicle description and the name of the owner of the vehicle filled in (A 24-26). The complaint, sworn out by a police officer, Richard Bishop, is expressly made upon information and belief, and fails to detail any underlying facts supporting Bishop's belief that Mr. Doran took a vehicle from Wayne Kahler, or identify sources of the allegation of theft. The additional "supporting" affidavit, (which postdates the warrant by about a month) was sworn out by another police officer, Thomas Bradley, who states therein that he had contacted unnamed "persons having knowledge of said offense," had prepared written reports and statements, and had received reports from other police officers and that all this information had been compiled in a report consisting of

nine pages (A 27-28). The nine page report was not attached, and there was nothing in the Bradley declaration to indicate why (or if) he believed his unnamed informants to be credible or their information reliable. Moreover, there was no inkling of what that information was. (Another affidavit by Bradley, identifying a photograph of Mr. Doran as the person charged, sheds no additional light on the facts behind the charge (A 29).

Such documents, like the affidavit in *Kirkland, supra,* 385 F.2d 672, and the complaint in *Giordenello, supra,* 375 U.S. 486-487 are factually insufficient to support a finding of probable cause. They are framed exclusively inconclusions and bald allegations of criminal conduct without underlying details. The warrant, complaint and Bradley declaration are sheer boilerplate[4]; much as the Attorney General abhors the term, Appellee employs it only to show that the Arizona charging documents are skeletal and nonspecific and fail to demonstrate, on their face, any support for the magistrate's putative determination of "reasonable cause." The Michigan Supreme Court was not obligated to assume the regularity of this standardized conclusion of reasonable cause where the accompanying papers do not reflect any information which could have formed the basis for a neutral and independent assessment of probable cause.

Appellant notes that the Arizona rules of criminal procedure place a duty on the magistrate to ascertain probable cause prior to signing an arrest warrant. Arizona

[4]The printed version found in the Appendix does not really do justice to the formlike nature of the charging documents and Appellee would refer this Court to the actual photostatic reproductions in the Record. Additionally, the complaint and warrant are word for word replicas of Form I and Form II(a), Arizona Rules of Criminal Procedure.

procedure permits, but does not require, the magistrate to consider information extrinsic to the complaint in finding probable cause. ARS Rules of Criminal Procedure, Rule 2.4. Appellant asks this Court to in effect presume from the procedure that the magistrate considered additional information even though nothing in the record indicates that she did so. The clear import of Rule 2.4 is that the magistrate may base his finding on the complaint alone. *State v. Lynch,* 107 Ariz. 463; 489 P.2d 697 (1971), cited by Appellant for the proposition that Arizona law places a duty on the magistrate to consider additional facts before issuing a warrant, seems to be a case where the defendant was arrested on less than probable cause, and later received a preliminary hearing on probable cause.

Assuming arguendo that additional investigation by the magistrate can be presumed, the record in this case belies any indication that there were additional details to support the allegations in the complaint. The original complaint and warrant specified that the date of the offense was December 18, 1975, a date on which it was undisputed that Mr. Doran was in Bay City, Michigan. (Record, August 13, 1976 Habeas Corpus Hearing Transcript, pp. 28-30, A 85-87). Subsequently, Arizona supplied the Bay County Prosecutor with an "amended" complaint and warrant: xeroxed copies of the originals with the December 18 date of offense crossed out and "December 3" written in. The complaint and warrant also charged Mr. Doran alternatively with embezzlement or theft of an automobile. The variance in dates as well as the mutually exclusive theories upon which Appellee was charged raise a strong inference that available details concerning the allegation of larceny were scarce. Appellant's assertion that Arizona was not "notified of the

hearings in the Michigan courts and was not given the opportunity to present any evidence at a habeas corpus hearing" is simply not true. The Bay County Prosecutor had contacted Maricopa County authorities before the August 13, 1976 habeas corpus hearing and requested "additional affidavits". (August 13, 1976 Habeas Corpus Hearing Transcript, p. 27). The additional affidavits were never forthcoming, although this case was not submitted to the Michigan Supreme Court until June 9, 1977.

Although some courts have conditioned rendition upon an actual evidentiary determination of probable cause in the asylum jurisdiction,[3] the Michigan Supreme Court has imposed a much less drastic prerequisite: charging documents facially reflecting sufficient underlying facts to support a magistrate's independent determination that probable cause exists to charge the accused fugitive with crime. Since Arizona did not comply with this minimal requirement, the Michigan Supreme Court was correct in refusing to extradite a Michigan inhabitant "in aid of an enterprise the key details of which remain in the dark." *Kirkland*, 385 F.2d 677.

[3]See *Tucker v. Commonwealth of Virginia*, 308 A.2d 783 (D.C. App., 1973); *People ex rel Porzio v. Wright*, 59 Misc. 2d 1056; 301 N.Y.S. 2d 668 (1969).

II.

A REQUIREMENT THAT A SHOWING OF PROBABLE CAUSE PRECEDE RENDITION IS IN HARMONY WITH THE EXTRADITION CLAUSE AND FEDERAL LEGISLATION ON EXTRADITION.

The Michigan Attorney General maintains that the *Doran* decision, as well as the holding of *Kirkland v. Preston* focus on the interests of the accused fugitive while disregarding the purpose of the Extradition Clause and the interests of the several states in speedy extradition. This is a misreading of both decisions, which actually seek to reconcile the Fourth Amendment safeguard against significant restraint without probable cause with the aim of the Extradition Clause to promote expeditious rendition of fugitives.

Interstate extradition is primarily governed by federal law, the source of which is Article IV, §2 cl. 2 of the United States Constitution. Supplanting the preexisting custom of exchanging fugitives solely on the basis of comity, Art. IV, §2 cl. 2 placed a duty on each state executive to return, on demand, a person "charged" in a sister state. *Innes v. Tobin*, 240 U.S. 127; 36 S. Ct. 290; 60 L.Ed. 562 (1916). 62 Stat. 822 (1948); 18 U.S.C. 3182, the implementing federal statute, provides for the return of a fugitive upon production by the demanding state of "a copy of an indictment found or an affidavit made before a magistrate . . . *charging* the person demanded" with crime.

Appellant cites many decisions of this Court construing the above provisions. These decisions appear to be primarily concerned with the permissible scope of a habeas

corpus inquiry, in the asylum state, into the sufficiency of a demand for extradition. From these decisions, a number of recurrent principles can be gleaned.

1. A state may enact ancillary legislation in aid of, but not in conflict with federal legislation on extradition. *Innes v. Tobin, supra.*

2. Extradition is a summary process which has as its aim the elimination of state boundaries to prevent guilty fugitives from finding permanent asylum in another state. *Appleyard v. Massachusetts*, 203 U.S. 222, 228; 27 S. Ct. 122; 51 L.Ed. 161 (1906); *Roberts v. Reilly*, 116 U.S. 80, 6 S. Ct. 291; 29 L.Ed. 544 (1885); *Sweeny v. Woodall*, 344 U.S. 86, 89; 73 S. Ct. 139; 97 L.Ed. 114 (1952); *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132-133; 38 S. Ct. 41; 62 L.Ed. 193 (1917).

3. A habeas corpus inquiry into the sufficiency of the "charge" upon which extradition is sought is limited to whether the documents submitted in support of the rendition demand "substantially charge" the accused fugitive with crime. *Pierce v. Creecy*, 210 U.S. 387, 405; 28 S. Ct. 714; 52 L.Ed. 1113 (1908); *Appleyard v. Massachusetts, supra* 203 U.S. at 228.

4. The substantiality of the charge is a question of law which must be determined upon the face of the charging documents. *Appleyard v. Massachusetts, supra*, 203 U.S. 228. *Roberts v. Reilly, supra*, 116 U.S. 80, 95. The sufficiency of such documents as a matter of technical pleading is not to be questioned upon habeas corpus. Only their sufficiency as a charge of crime may be probed. *Pierce v. Creecy, supra*, 210 U.S. 387, 409.

5. A habeas corpus inquiry in the asylum state may not extend to the merits of the charge against the accused fugitive (i.e. the question of his guilt or innocence) for to go

beyond the face of the papers supporting the demand would violate the interests of comity and unduly burden the extradition process. *In the Matter of Strauss*, 197 U.S. 324; 25 S. Ct. 535; 49 L.Ed. 774 (1905).

Contrary to Appellant's intimation, Appellee submits that the *Doran* decision is in harmony with all the above principles.

A. The Michigan Supreme Court in *Doran* limited its habeas corpus review of the Arizona charging documents to the question of whether those documents, on their face, "substantially charged" the accused fugitive with crime.

Federal legislation on extradition excludes state action only in matters for which the Federal statute expressly or by necessary implication provided. Section 3182 does not expressly define, or limit, definition of its "affidavit . . . charging" requirement. In *In Matter of Strauss, supra*, 197 U.S. at 331, this Court afforded a liberal interpretation to the term "charged",

> "[D]oubtless the word 'charged' was used in its broad significant to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense, and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge."

The Uniform Criminal Extradition Act, Section 3, enacted by Michigan, MCLA 780.3; MSA 28.1285(3), and Arizona, ARS 13-1303, did not depart from this broad

concept of a charge in its requirement that the "indictment, information or affidavit" tendered by the demanding state "must substantially charge the person demanded with . . . crime".

The holding of the Michigan Supreme Court did not conflict with this liberal definition of a charge when it construed the Section 3 "substantially charge" requirement to mean that extradition charging documents must reflect probable cause. *Doran, supra*, 401 Mich. at 245. Several other courts have also equated a "substantial charge" with a charge supported by probable cause. *Martinez v. Sheriff of Clark County, supra*, 527 P.2d 1200, 1201; *Sheriff of Clark County v. Thompson, supra*, 452 P.2d 911, 914-915; *Brode v. Power*, 31 Conn. Sup. 412; 332 A.2d 376 (1974); *Kirkland v. Preston, supra*, 385 F.2d 676.

Thus, the Michigan Supreme Court, sitting as a reviewing court in a habeas corpus proceeding challenging extradition, did not exceed any of the traditional strictures on extradition habeas corpus. The Supreme Court confined its scrutiny of the Arizona charging documents to the face of those documents. The Court expressly declined to inquire into the merits of the charge or into the question of guilt or innocence. *Doran, supra*, 401 Mich. 250. Further, the Michigan Court carefully limited its inquiry to the question of whether the Arizona documents substantially charged a crime by demonstrating probable cause. *Doran, supra*, 401 Mich. 245.

Further, the Michigan Court's scrutiny of the Arizona documents can hardly be characterized as "hyper-technical." It has never been suggested that the question of probable cause for charging a crime is a matter of technical pleading. See *Martinez v. Sheriff of Clark County, supra,*

527 P.2d 1201; *Sheriff of Clark County v. Thompson, supra,* 452 P.2d 911, 914-915. Rather, this Court has traditionally characterized the question of probable cause as distinct from guilt or innocence, and as a subject of commonsense, rather than hypertechnical, inquiry. See *United States v. Ventresca,* 380 U.S. 102, 109; 85 S. Ct. 741; 13 L.Ed.2d 684 (1965). Thus, the Michigan Supreme Court made no attempt to expand the traditional scope of extradition habeas corpus. See Note, *Extradition Habeas Corpus,* 74 Yale L.J. 78 (1964); *State v. Ritter,* 74 Wis.2d 227; 246 N.W. 2d 552, 554-555 (1976).

B. A requirement that charging documents in support of a requisition reflect probable cause does not burden the process of extradition.

An extradition habeas corpus proceeding has, as its purpose, the accommodation of contrasting, but not necessarily conflicting interests: the interests of comity in transactions between sister states, and of efficiency in the rendition of fugitives, counterbalanced against the right of the individual to be free from unjustified significant restraints and the asylum state's right to protect its inhabitants from such intrusions. *State v. Ritter, supra*, 246 N.W. 556-557. Appellant seems to assume that since the Michigan Supreme Court in *Doran* relied heavily on Fourth Amendment protection of individual rights, the federal interests of comity and speedy extradition were ignored.

This conclusion does not necessarily follow from the *Doran* result. As noted by Judge Spaeth, dissenting in *Commonwealth ex rel Marshall v. Gedney,* 237 Pa. Super. 372; 352 A.2d 528, 534 (1975).

"For a statutory provision to be constitutional, it must conform to all parts of the Constitution. To say that it implements one clause – here, the extradition clause – is not enough if in carrying out that implementation it directly conflicts with another part of the Constitution. Therefore, for the federal and state extradition statutes to be constitutional, they must conform not only to the requirements of the extradition clause, but also to the requirements of the fourth and fourteenth amendments, which is to say, as regards this case, that 'no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing. . . the persons. . . to be seized. U.S. Const. Amend. IV."

In *Bailey v. Cox*, 296 N.E. 2d 422 (Ind., 1973), the Supreme Court of Indiana took the position that to inquire into whether there is probable cause for the initiation of criminal proceedings in the demanding state would thwart the intent of the Extradition Clause.

The dissent of Justice DeBruler eloquently refuted this notion:

"Finally, I would say that there is no conflict between the requirements of Art. IV, §2, cl. 2, of the United States Constitution, and the requirements of the Fourth Amendment. Neither impinges upon the other. They are in harmony. A person is not charged by affidavit under Art. IV, §2, cl. 2 until an arrest warrant is issued. *Kirkland v. Preston, supra.* The Fourth Amendment governs the issuance of an arrest warrant. So construed they serve to supplement one another." *Bailey v. Cox*, 296 N.E. 2d 422, 428 (1973).

To require extradition charging documents to conform to the Fourth Amendment does not encumber the extradition process by "strapping on unnecessary formalities." *Wellington v. State of South Dakota*, 413 F. Supp. 151, 154 (S.D., 1976).

The *Doran* decision does not undermine the doctrine of comity by second guessing the regularity of judicial processes in a sister state. Rather, the *Doran* Court confined its Fourth Amendment scrutiny to the *face* of the demanding state's charging documents. Nor does the *Doran* result obstruct the summary nature of extradition. If the demanding state does have probable cause data, it is no real inconvenience to record this evidence in the extradition papers:

". . . documenting probable cause on the face of an affidavit requires no more than what policemen do on a daily basis to secure arrest or search warrants." *Wellington v. State of South Dakota, supra,* 154.

See also Note, *Interstate Rendition and the Fourth Amendment,* 24 Rutgers L. Rev. 551 (1970).

Governors, or habeas corpus judges, will hardly be significantly burdened by having to study written submissions for probable cause in extradition cases. *Kirkland v. Preston, supra,* 385 F.2d 670, 677; *Ierardi v. Gunter, supra,* 528 F.2d 929, 931. The resulting imposition on interstate law enforcement is negligible compared with the very serious consequences of a wrongful extradition.

Thus, the Michigan Supreme Court's action in refusing to extradite a presumptively innocent defendant on the basis of a requisition not visibly supported by a magistrate's neutral determination of probable cause strikes a harmonious balance between the demands of the Fourth Amendment and the Extradition Clause. Such equilibrium is the aim of a system of ordered liberty.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Honorable Court affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

STATE APPELLATE
DEFENDER OFFICE

KATHLEEN M. CUMMINS
Assistant Defender
Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
256-2814